Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986
Case No. 86-1218

(3)

E. F. HUTTON & COMPANY,
INCORPORATED and PETER PANOS,

Petitioners,

vs.

FREDERICK J. WOLFE AND
HEATHER B. WOLFE, HIS WIFE,

Respondents.

MERRILL LYNCH, PIERCE, FENNER &
SMITH, INCORPORATED,

Petitioner,

vs.

JOSEPH GORMAN,

Respondent.

WOLFES' RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The question presented in this case is whether the Circuit Court erred in affirming the trial court's denial of E.F. Hutton & Company's Motion to Compel Arbitration of Frederick J. and Heather B. Wolfe's claim under the 1934 Securities Exchange Act.

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STATEMENT OF THE CASE

The Wolfes sued E. F. Hutton for its mishandling of their funds and account. The Wolfes stated claims against Hutton for violations of §17(a) of the Securities Act of 1933 (15 U.S.C. 77[q]) and 10[b] of the Securities Act of 1934 (15 U.S.C. 78[j][b]) and for violations of Florida Statutes, Chapter 517, by "churning", for attorney's fees pursuant to Florida Statutes, Chapter 517 and under state law for breach of fiduciary duty, gross negligence, and outrageous conduct, claiming a right to punitive damages under the state common law claims. E. F. Hutton moved to compel arbitration relying on the language of its customer's agreement with the Wolfes.

The District Court denied Hutton's Motion to Compel Arbitration. Hutton appealed the Order Denying Arbitration. After the filing of briefs and with oral argument scheduled, Hutton successfully asked the Circuit Court to consolidate Wolfe with Gorman v. Merrill Lynch, Pierce, Fenner & Smith.

The Circuit Court affirmed the District Court's ruling denying arbitration of the Wolfes' federal securities law claims, but reversed the District Court's ruling which had denied arbitration on the Wolfes' state law claims, Wolfe v. E. F. Hutton & Company, Inc., 800 F.2d 1032 (11th Cir. 1986) (en banc).

Hutton now asks this Court to review the Circuit Court's ruling on the Wolfe's 1934 Securities Exchange Act

claims, citing inter-circuit conflict and the significance of the arbitrability issue.

SUMMARY OF ARGUMENT

The Circuit Court properly affirmed the right of access to the Federal Courts, and properly denied the brokerage house's Motion to Compel Arbitration of their customers' federal securities law claims. Certiorari should be denied.

ARGUMENT

The Wolfe's constitutionally protected right to a Federal Court jury trial of their 1934 Securities Exchange Act claim is intact and is protected by the provisions of the 1934 Securities Exchange Act vesting the courts with exclusive jurisdiction over those claims. 15 U.S.C. §78aa.

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa vests the Federal Courts with exclusive jurisdiction of claims brought pursuant to the 1934 Act and the rules and regulations promulgated thereunder.

Section 29 of the Securities Exchange Act of 1934 makes unenforceable any agreement purporting to waive any provision of the Act, or the related

rules and regulations. 15 U.S.C. §78cc. The Securities Exchange Commission also has subsequently recognized the unenforceability of pre-dispute agreements purporting to require arbitration of federal securities law claims; in fact, a brokerage house's failure to tell its customers that compelled arbitration of federal securities claims is prohibited, now constitutes a fraudulent misrepresentation. S.E.C. Rule 15c2-2.

The 1934 Act came into existence nine years after Congress' passage of the Federal Arbitration Act relied upon by Merrill Lynch and E.F. Hutton. The 1934 Act reflects the importance of the federal judicial forum in Congress' efforts to regulate and control the country's securities

markets. Congress has had every opportunity to know of the courts' refusal to enforce pre-dispute arbitration agreements on 1934 Securities Exchange Act claims and has chosen not to amend the pertinent statutory provisions relating to customers like the Wolfes, despite its various amendments to other portions of the 1934 Act.

The Wolfes cannot deny the post-Byrd[1] existence of inter-circuit conflict. They also cannot in good faith deny the importance and significance of the issue presented here. Nevertheless, the record before the Court below clearly supports the Circuit Court's

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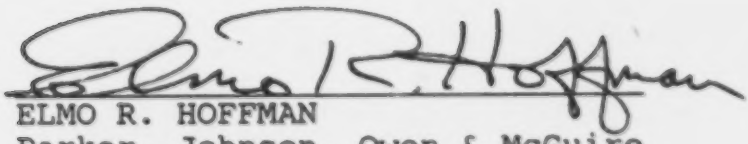
[1] Dean Witter Reynolds, Inc. v. Byrd, _____ U.S. _____, 105 S.Ct. 1238 (1985)

ruling, and warrants denial of the brokerage house's Petition for Writ of Certiorari.

CONCLUSION

The Eleventh Circuit's ruling denying the compelled arbitration of federal securities law claims should be affirmed. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I Hereby Certify that forty originals of the foregoing Response to Petition for Writ of Certiorari have been furnished by Federal Express this 13th day of April, 1987 to the Clerk of the U.S. Supreme Court, and by U.S. mail this 13th day of April, 1987 to Karen A. Gievers, Atty., Courthouse Tower, 44 West Flagler Street, Miami, FL 33130 and to Bennett Falk, Esq., One Biscayne Tower, Suite 2020, Two South Biscayne Blvd., Miami, FL 33131.

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